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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 37

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

—v.—

DONALD M. PAINTEN,

Respondent.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE CIVIL LIBERTIES UNION OF MASSACHUSETTS AS *AMICI CURIAE*

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Interest of the *Amici*

For a half century the American Civil Liberties Union has engaged in legal controversies in support of the Bill of Rights and of the continuing struggle for legal recognition of the demands of civilized procedure in the administration of criminal justice. We believe that the issue presented in this case is one of importance to the enforcement of the Fourth Amendment in a wide range of applications, going beyond the interests of the parties herein, and we wish with deference to submit our views concerning its proper resolution to the Court. The parties have consented to the filing of a brief by the American Civil Liberties Union. Copies of their letters of consent have been filed with the Clerk.

Argument

The question decided by the courts below and presented for review by this Court* is a subspecies of a broader issue that pervades administration of the Fourth Amendment. The issue is: what pertinency has a law enforcement officer's purpose, his intent, his state of mind, for the validity of his conduct under the Amendment? Or, to put it conversely: to what extent, and under what circumstances, should the rules of Fourth Amendment regulation be fashioned to take account of the officer's purpose, his intent, as distinguished from a wholly objective assessment of what he does?

A few specific applications of the issue will exemplify, but not exhaust, its range. (1) A highway patrolman flags down a motorist, asks to see his operator's license and, looking through the outside windows of the car, perceives recognizable contraband on the floor of the rear seat. The officer has no warrant for the car or driver, and no probable cause to believe that the car is carrying contraband or that its driver has committed or is committing a crime. Is it material to the lawfulness of the stop whether the officer is engaged in a *bona fide* license check or is using the license check to try out his suspicion (not amounting to probable cause) that the driver is rum-running? (2) A postal inspector opens a third-class envelope without a warrant and discovers obscene literature. Is it material to the lawfulness of the search whether his purpose was to assure that the envelope's contents qualified for the third-

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* This brief is limited to discussion of the single issue identified in the text. We do not treat other grounds upon which the decision below might be affirmed.

class rate, or was to verify his suspicion that obscene mailings were emanating from a particular sender? (3) An officer sees a group of bearded and bizarrely dressed young men gathered in a public park. He stations himself nearby and, when one of the young men is heard to curse, arrests him for profanity and searches him incident to the arrest, discovering marijuana. Is it material to the lawfulness of the arrest and search whether the arrest was in fact designed to hold the man to answer a profanity charge, and the search to protect the officer against a possible concealed weapon; or whether both arrest and search were motivated by the officer's wish to check for marijuana? (4) An undercover agent for the Federal Bureau of Narcotics makes a purchase of illicit heroin from Mr. X. On the basis of this transaction, FBN agents obtain a valid warrant for the arrest of X. They execute it by arresting X in his apartment, and they search the apartment after the arrest. Is it material to the lawfulness of the entry, arrest and search whether the decision to arrest X at home was made because he happened to be home at the first convenient opportunity for an arrest following the issuance of the warrant, or because the officers preferred to stage the arrest in a fashion that would allow "incidental" search of the apartment?

There are numerous other sorts of Fourth Amendment questions which do—or might doctrinally be made to—implicate a law officer's purpose or intent. The several specific situations described in the preceding paragraph will serve to delimit the sort of case which we propose to discuss in this brief. They are characterized by the following attributes: (A) A power is claimed by a law enforcement officer to engage in conduct that intrudes upon

the privacy or personality of a citizen (the power to stop a moving car, to open a mailed envelope, to make an arrest, to enter an apartment). (B) The allowance of that power consistently with the Fourth Amendment is sought to be justified by the existence of a specific law enforcement need (to check operators' licenses, in order to guard against the dangers of unlicensed drivers; to inspect low-postage mail, in order to assure against abuse of limited mailing privileges by employment of the low rate for non-qualifying mail; to make an arrest, in order to assure the presence of an accused at his trial; to enter a dwelling, in order to effect an arrest). (C) The power may in fact be exercised by an officer for some other purpose than the one which is asserted to justify it. The questions that are judicially posed in such cases are: Should the power claimed be allowed at all? If so, under what circumstances? Should the circumstances that condition the allowable exercise of the power include the requirement that it be used for the purpose for which it was given? Should other doctrinal devices be employed to assure that, for the most part, the power will be used only in the service of the purpose for which it was given?

These questions may be made somewhat more concrete by identifying the sorts of possible judicially formulable rules in one of our hypothetical situations. We take the case of third-class mail. The Court might say that although first-class mail may be opened only upon a warrant (this is so both by force of an early dictum of this Court construing the Fourth Amendment, and more recently by force of statute), third-class mail may be opened without a warrant. The justification for such a decision would doubtless be that some sort of a check (without probable cause) of pur-

ported low-postage mail is necessary to assure the integrity of the postal rate structure, and that the extent of the intrusion involved in such inspection is not incommensurate in light of the regulatory or law enforcement need, particularly since the citizen can purchase the protection of the warrant requirement for a few cents more. Having allowed the power to make warrantless search of third-class mail, the Court might hold that that power can be exercised irrespective of the searcher's purpose, and that anything found may be used in evidence without restriction. Or it might say that the search power is unlawfully exercised whenever it appears that the searcher's purpose was not rate-control inspection but criminal investigation, since the sole justification for allowing the power is not present in such a case. Alternatively, the Court might fashion a rule excluding from evidence anything found in a third-class mail search *except* evidence that non-qualifying mail was sent under third-class rates. The rationale of this last rule, of course, would be to discourage abuse of the rate-control search power by removing any incentive to employ it for ulterior purposes, thus leaving postal inspectors no motive for search except that which supports the search power given.

The dangers of abuse of a particular power are, we would suppose, a pertinent consideration in determining whether the power should be allowed in the first instance. Thus, it is not inconceivable that the Court might conclude that the intrusiveness of third-class mail inspection, *plus* the possibility of its abuse as a means for criminal investigation free of the usual warrant safeguard, outweigh concerns for the integrity of the postal rate structure, and compel the conclusion that warrantless third-class mail

searches should never be allowed. We think it still more likely that the Court might say that motor-vehicle stoppings without probable cause are altogether impermissible, because the danger of abuse of the license-check pretext far outweighs the need of the police to apprehend unlicensed drivers not observed to be violating other traffic laws or driving unsafely. Such total disallowance of a claimed police power on grounds of its potential for abuse is particularly justifiable where the power is extremely intrusive, the potential for abuse is high, and the asserted justificatory need is not particularly weighty even in cases squarely and legitimately within the scope of justification.

But the need for a particular police power may sometimes be intense, although narrow. We do not suppose that the Court would hold it unconstitutional to make an arrest upon probable cause (or at least on view) for any minor offense, simply because the arrest power may be—and, indeed, very frequently is—abused by its employment as an investigative tool. The justifications for arrest—to stop a course of criminal conduct, and to assure that the offender is forthcoming for prosecution—are probably sufficiently compelling to preclude entire disallowance of the arrest power. The question remains: should curbs be retained against the likely abuse? One such curb would be to disallow any search incident to minor-offense arrests, or at least to require the exclusion from evidence of anything found in "incidental" searches. Another would be to pursue inquiry into the officer's "purpose" in making the arrest, and hold the arrest unlawful if the purpose were found bad. The first alternative is obviously the more drastic.

It might well be that in the case of police powers whose intrusive quality is not great or the likelihood of whose abuse is exceedingly slight, neither of the alternative curbs is appropriate. Where the power is very intrusive and the likelihood of abuse substantial, the drastic exclusionary sanction may be called for. For example, if this Court *were* to hold that police may stop motorists without probable cause for "license checks," we would think that the case for a rule excluding from evidence anything observed in the course of the stop would be compelling. We say this without ignoring the doctrinal problems involved in such a rule, which unhinges the exclusionary sanction from the "substantive" constitutional regulation that it enforces, and applies exclusion to the product of a practice that is not itself constitutionally condemned. But we do not think the doctrinal problem insurmountable, since the Court's decisions firmly establish that the exclusionary sanction is, in its entirety, a judicially created enforcement technique and, as such, judicially malleable to serve its vital purposes. However that may be, situations involving lesser degrees of police intrusion or of likelihood of abuse probably do not demand or justify the use of a broad exclusionary rule to discourage abuses. In some such situations, we think the alternative safeguard—inquiry into police purpose—is appropriate.

That brings us to the present case. The matter comes here after concurrent findings by two federal courts below that police officers went to Painten's door and knocked with the purpose of entering to make an arrest and search of the apartment. The officers had no search warrant, nor even probable cause. Those findings have record support and it would be inconsistent with the usual scope of review

by this Court to upset them. The question, then, is whether on such facts the police conduct violated the Fourth Amendment.

The Commonwealth of Massachusetts argues that it did not. The Commonwealth does not contend that the officers' purpose—if it was what both courts below found that it was—was licit. Such a contention could not be entertained, for the most fundamental principles of the Fourth Amendment condemn a warrantless police entry into a dwelling in the night time, without probable cause to arrest an occupant. But the Commonwealth says that this purpose is constitutionally irrelevant. The Fourth Amendment question, it argues, is addressed only to what the officers *did*, not why they did it. Starting from the premises, then, that officers may constitutionally knock at a citizen's door for any of a number of licit purposes—to make inquiries of persons inside, to ask the inhabitants to cooperate in observing a new parking regulation, to sell tickets to the Policemen's Ball—the argument proceeds through the principle of irrelevancy of motive to the conclusion that the knock on the door in this case, although a sly subversion of police power, was not in excess of such power and hence should be sustained.

The argument is beguiling. It purports to pose for this Court's choice two inconsistent perspectives in the enforcement of the Fourth Amendment: the "objective" perspective and the "subjective" perspective. The objective perspective concerns itself only with the circumstances under which the police act, and the nature of their conduct in those circumstances. The subjective perspective turns constitutional consequences on what the police are thinking. As between these two perspectives, the objective one is

preferred. This is so for reasons which the Commonwealth articulates forcefully. Fourth Amendment rules are principally mandates for the harried policeman and the hurried motions judge. They should be as simple and workable as possible, so that the policeman can know what is expected of him and the judge can enforce it. Subjective standards are difficult to abide by, hard to administer. Judicial investigation of police purpose is a frustrating, ordinarily futile endeavor; and the policeman cannot predict its outcome. The impracticable trial of mental states is, in any event, not worth the trouble, since whatever it is that the policeman does is equally intrusive upon his suspect's privacy, whatever its motivation. What the citizen cares about, and what the Amendment restricts, is where, under what circumstances, the policeman's body ends up, not by what cogitative paths his mind leads him there.

We agree with these points, and with the conclusion that any general principle of Fourth Amendment construction that turns its restraints in large part upon inquiry into police mental states would be unbearable. A broadly "subjective" perspective would commit the guarantees of the Fourth Amendment almost entirely into the keeping of the police—whose restraint is the Amendment's purpose. In saying this, we do not refer principally to the risk of police perjury, although perjury is a factor to be reckoned with. The more essential problem is that rules focused on police purpose are a self-fulfilling prophecy. If a policeman is told that a certain purpose validates what he wants to do, he will honestly have that purpose. He would be less than human if he did not.

For this reason—and because the Fourth Amendment *is* more concerned with the tangible invasions of a citizen's

privacy than with the policeman's intangible accompanying cerebrations—most of the rules restricting police conduct have to be strictly objective. They must describe what acts a policeman is permitted to do under what circumstances, and hold unconstitutional any objective excess of action or objective deficiency of justification. Absent a warrant (or "exceptional circumstances"), for example, a policeman cannot be permitted to enter a dwelling for any purpose, however benign. If he comes selling Policemen's Ball tickets, he may knock at the door; but, if he receives no answer, he may not try the knob and enter.

It does not follow, however, that because the rules constraining the maximum permissible allowance of police authority in various situations under the Fourth Amendment must be objective, that *all* Fourth Amendment rules must be. To say that licit motive cannot validate an objectively invalid search or seizure, does not compel the converse proposition: that *illicit* motive can never *invalidate* an objectively valid one. Here is where we part company with the Commonwealth, and with its analysis that invites this Court to choose between a subjective and an objective Fourth Amendment. We think no such choice is posed.

Rather, we submit, *either* a wholly subjective or a wholly objective perspective on the Fourth Amendment—a general reliance upon, or a total exclusion from consideration of, police "purpose," "intent," "motivation"—would defeat the Amendment as an instrument of practical government. We have stated our objections to a subjective Fourth Amendment in the immediately preceding paragraphs. Our objections to a wholly objective Fourth Amendment derive from the considerations we identified earlier in the brief.

Under any set of Fourth Amendment principles, certain powers must be given the police for specific and limited purposes—that is, under the impulsion of specific and limited justifications. These powers are given them not because their exercise is not intrusive, but because its intrusiveness is justified in light of particular law enforcement needs. When the needs are not present the justification fails, and an impermissible intrusion remains. Of course, the objective circumstances which are made the prerequisite conditions of the power serve to assure that, in some measure, its exercise will be confined to the general area of the justificatory need. Allowance of police power to enter a dwelling to make an arrest, for example, is "objectively" limited to situations where the police have the makings of a valid arrest (an arrest warrant or probable cause), and where they have reasonable grounds to believe that the person sought to be arrested is in the dwelling. If either of these prerequisite conditions fails, the need justifying the power of entry fails, "objective" circumstances proclaim its failure, and the power is withdrawn under "objective" standards. The trouble is that there is often only a very approximative correlation between the justificatory need and any definable set of objective circumstances; thus, the need may be lacking although all of its objective components are present and accounted for. Police who have a valid arrest warrant for a man reasonably believed to be in a dwelling do not invariably have to enter to arrest him; often they choose not to do so; and when, conversely, they do choose to enter, it may be for very different reasons than those whose supposition persuades the courts to grant the entry power.

The fewer the objective conditions on any given power, of course, the less effective are those conditions as a means

of assuring some rough alignment between the exercises of the power and its justifications. The only limitation on the power of third-class mail inspection is that the mail be third class. But there is palpably no need to open every piece of third class mail, and the postal inspectors do not. The principles by which they determine what third-class mail to open, therefore, may stray very far from the judicially recognized justification relating to postal rates, and no "objective" check be available to hold the power in line. In such a situation (and unless the courts are willing to fashion a blanket exclusionary rule of the sort we have suggested above), a "subjective" check via inquiry into the officer's purpose seems to us better than no check at all.

This is certainly the case, we believe, with the power of policemen to knock on the doors of dwellings in the night time, as happened to Donald Painten. A night-time knock on the door is no small intrusion to a home-owner. The potential of the knocking practice for abuse—its potential employment by police with no legitimate business, banging around to see whether something turns up—must surely be apparent to anyone who notes in the Advance Sheets alone the number of defendants convicted on police testimony of what was seen through the crack of a half-opened apartment door. And, on the Commonwealth's own theory in this Court, the practice is not objectively regulable, because there are no necessary objective preconditions to its validity: police may knock on *any* door, on *any* set of facts, without probable cause, as they did to Painten. We think that state of affairs falls considerably short of the protection of the people in their houses envisaged by the Fourth Amendment. Unless this Court is prepared to declare a broader "objective" safeguarding rule—that police without a war-

rant and without probable cause are never permitted to knock on the doors of dwellings in the night time; or that, at the least, anything they observe as a result of the knock is inadmissible in evidence in a subsequent criminal trial of the home-owner—we submit that the least the Amendment requires is the check of a "subjective" inquiry into the question whether the knocking officer's purposes were within the range of those legitimate ones for whose effectuation the power to knock is given him.

We do not make this submission in the expectation that many entries will be judicially invalidated as a result of inquiries into police purpose. In our experience at least, the courts below reached a rare result in making factual findings against the police. Such findings are rarer still in state courts than federal, and almost never are made if a policeman testifies squarely to any set of facts on the basis of which his action can be sustained. If this habitual tendency of judges to credit police testimony is coupled with the natural tendency of the police to testify whatever is necessary to validate their conduct—a tendency which the Commonwealth candidly admits at page 9 of its brief by the observation that "Under the decision of the Court of Appeals, . . . police officers would feel compelled to give reasons other than the true ones"—few police actions are going to be invalidated by reason of illicit purpose. But even if this be true, the inquiry serves some useful purposes.

Experienced criminal attorneys are often heard to remark that police testimony in search-and-seizure cases has the monotonous sameness that was proverbially characteristic of uncontested divorce cases under the (old) New York

law. Policemen can and apparently do "feel compelled to give . . . other than true" testimony about physical facts as well as psychic ones. Nevertheless, trial courts habitually believe them, and appellate courts habitually affirm the trial courts. There is often something of an air of unreality about this whole business in the motions court. What is being litigated is what this Court recently said was a valid piece of police work, rather than what happened to the defendant who is moving to suppress.

Inquiry into police motive or purpose can oftentimes breathe some fresh air of reality into the process. This is so not because "pat" tales of licit motive are impossible to construct falsely. They are often easy to construct. But the officer who abuses his powers by exploiting them for impermissible ends has a somewhat more difficult time squaring his testimony with *both* objectively verifiable fact (which is not known independently by the judge, but may be provable by the defense) *and* a plausible-sounding theory of police purposes and objectives (as to which the judge, before long, begins to form his own general impressions on the basis of past police testimony he has heard, together with a common-sense appreciation of what the police are after), than with the verifiable facts alone. The conflicts between facts and ostensible purposes may be made the matter of embarrassing cross-examination (whose prospect itself may be some deterrent to police illegality); and even though the motions judge credits the officer in the end, he may do so with some unease that tends in the end to give him a warranted skepticism toward police testimony in these cases. Appellate courts, also, may affirm; but, again, not without the unease that is engendered by exposure to records on which the lower courts credited

seemingly incredible testimony. These, we think, are processes that tend toward the maintenance of healthy correctives within a system of litigation that turns almost entirely upon professional testimony by officers.

We must emphasize again that in making these last points we are not supposing a prevalent condition of wholesale police perjury; nor does our submission in this Court rest on any such supposition. We merely answer the Commonwealth's point that the only effect of judicial inquiry into police purpose is to compel the police to lie. We think rather that they will tell the truth sometimes and lie sometimes; that they will act with some awareness of the inconveniences of having to lie; that when they lie, they will sometimes be caught at it; that more frequently they will not; but that the litigation process will be better ventilated by reason of the inquiry into why they did what they did. And the Fourth Amendment, we submit, will be better served by the resulting constant reemphasis—and occasional vindication—of the principle that police intrusive powers, allowed only because judicially deemed necessary for one or a few limited purposes, may not with complete impunity be subverted to others which encourage their over-frequent exercise.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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